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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[REDACTED]

JUN 20 2003

File: EAC 00 126 52416

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign profit corporation organized in Hong Kong and certified to do business in the State of New Jersey. It is engaged in the integration of transportation solutions for multi-national importers, exporters, and domestic shippers in North America. It seeks to employ the beneficiary as an information resources manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been employed for a one-year period in a managerial or executive capacity for the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial capacity for the United States petitioner.

On appeal, counsel for the petitioner submits a brief and asserts the information in the brief more accurately reflects the beneficiary's employment with the petitioner. Counsel asserts that the beneficiary should be approved as a multi-national manager.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or

subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issues in this proceeding are whether the beneficiary performed primarily managerial duties for the overseas entity and will perform primarily managerial duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The petitioner initially stated that the beneficiary implemented the system network set-up of the petitioner's overseas offices. The petitioner indicated the beneficiary specifically "developed a

Management of Information System department in Asia and trained, supervised, and utilized several staff members in each office to handle complicated day to day operation and maintenance." The petitioner indicated further that the beneficiary was responsible for "planning and executing complicated information system projects in the Asia offices, including system links to several transportation terminals, development of a tracking system, development of a warehouse receiving system, development of an invoice system, and development of an inventory control system." The petitioner added that the beneficiary had also prepared and controlled the budget for the petitioner's China and Hong Kong offices.

The petitioner indicated that the beneficiary, since his admission to the United States as a nonimmigrant intracompany transferee in L-1A status, had worked for the petitioner as its information resources manager. The petitioner indicated that the beneficiary was responsible for "managing system maintenance worldwide." The petitioner indicated that the beneficiary designed, implemented and monitored the petitioner's computer network connections and the integration of its logistics operation system into its Internet service. The petitioner indicated that the beneficiary also developed and maintained a security policy for its logistics system, computer network, and financial system, and supervised all systems contractors that supported the United States and Asian operations.

The director requested additional evidence to demonstrate that the beneficiary had been and would be engaged in a primarily managerial or executive position with the United States firm. The director also requested complete position descriptions for the petitioner's United States employees. The director also requested that the petitioner provide evidence of contractors used, if it had used contractors.

In response, the petitioner submitted a copy of its organizational chart showing the beneficiary as one of several individuals, each holding a different position, reporting to the director of management of information systems. The beneficiary's position was depicted as "IT manager" with the unfilled position of network administrator subordinate to the beneficiary's position.

The petitioner also provided a lengthy description of the beneficiary's duties. The petitioner indicated that the beneficiary was responsible for data network management, system security management, disaster recovery, system inventory management, Internet services maintenance, log-net systems support, and user training and support. The petitioner also outlined the beneficiary's specific tasks. The petitioner repeated some of the already stated responsibilities and added that the beneficiary was also responsible for daily system inspection, data back-up management, network wiring maintenance and repair, mail system maintenance, system equipment and

application purchase, hardware maintenance and repair, installation and maintenance of applications, and user and customer support. The petitioner also provided the beneficiary's description of his daily tasks. The beneficiary indicated that he spent his day checking e-mails, reviewing project implementation status and modifying plans as necessary, reviewing network architecture and system security and planning for future growth or enhancement, testing system upgrades and resolving system issues, meeting with other departments, and engaging in phone conferences with Asia offices.

The director determined that the description of the beneficiary's duties for his position prior to entering the United States as a nonimmigrant was indicative of an individual primarily performing duties required to implement and maintain a computer network. The director found that the beneficiary's supervision of other staff members had not been documented in the record. The director further determined that the beneficiary's position with the United States entity was also operational and not managerial. The director noted the beneficiary's description of his duties and determined that the description indicated that the beneficiary was principally involved in maintaining the petitioner's computer network(s).

On appeal, counsel asserts that the beneficiary sets company policy with respect to the company's computer and network systems and manages all computer system departments and personnel around the world. Counsel also asserts that the beneficiary is one of the petitioner's senior managers and that all of the senior managers must perform ordinary tasks in addition to their administrative and management duties. Counsel further asserts that the beneficiary's duties are primarily managerial duties and that the beneficiary reports to one of four executive officers at the United States headquarters. Counsel also asserts that the beneficiary manages approximately 13 computer system employees and hires contractors and vendors to assist him in implementing the petitioner's global network. Counsel submits an organizational chart depicting the beneficiary's position to support this assertion. Counsel finally asserts that the prior approval of the beneficiary as a nonimmigrant intracompany transferee in L-1A status is sufficient evidence of the beneficiary's managerial capacity.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). As determined by the director, the description of the beneficiary's job duties for both the beneficiary's overseas position and the position for the United States entity, describes an individual who is primarily performing the duties required to implement and maintain a computer network. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in

a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Also as determined by the director, the record does not contain independent documentary evidence that the beneficiary supervises contractors or other employees. The petitioner's first organizational chart does not indicate any filled positions subordinate to the beneficiary. The petitioner has not provided documentary evidence of counsel's assertion that the beneficiary supervised computer system employees and contractors when the petition was filed. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the record contains two disparate organizational charts. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Neither the petitioner nor counsel has explained the lack of positions subordinate to the beneficiary on the original organizational chart submitted and the addition of several positions subordinate to the beneficiary's position on the revised organizational chart. As stated previously, the petitioner has not provided independent documentary evidence substantiating the employment of individuals in positions subordinate to the beneficiary.

Counsel's reliance on past approvals of the beneficiary as a nonimmigrant intracompany transferee in L-1A status is also not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions and the record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. However, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Bureau. The Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Moreover,

the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. The AAO is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In sum, the record contains insufficient evidence to demonstrate that the beneficiary was employed in a managerial capacity overseas or has been or will be employed in a primarily managerial capacity for the United States entity. The descriptions of the beneficiary's job duties are indicative of an individual performing the operational tasks associated with implementing a computer network system for the petitioner. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been or will be employed primarily in a managerial capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.